

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NO: J1228/09

In the matter between:

POPCRU obo T. C MPHUTHI

APPLICANT

AND

**THE MINISTER OF CORRECTIONAL
SERVICES**

RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction

[1] This is an urgent application brought in terms of Rule 8 of the Labour Court Rules. The applicant seeks to review and set aside the respondent's decision to suspend him pending investigations of allegations for misconduct.

[2] The application is opposed by the respondent.

The parties

[3] The applicant is POPCRU, a duly registered trade union acting in terms of section 200 of the Labour Relations Act 66 of 1995 on behalf of T. C Mphuthi, its member.

- [4] The respondent is the Minister of Correctional Services and is cited in his official capacity as the Minister responsible for the Department of Correctional Services.

The facts

- [5] Mphuthi is employed by the respondent as a Correctional Services Official. He is based at the Boksburg Management Area. He is a shopsteward of POPCRU.
- [6] On 09 June 2009, Mphuthi was called to represent another Correctional Services employee (Mbebe) in a disciplinary hearing.
- [7] At the disciplinary hearing, management informed Mbebe that they were converting her contemplation / intention to suspend hearing into a final written warning.
- [8] Mphuthi objected and demanded that proper procedures be followed before a member is issued with a final written warning. Management insisted that Mbebe sign a letter containing a final written warning. Mphuthi and Mbebe walked out of the meeting without accepting the final written warning.
- [9] On 11 June 2009, Mphuthi was served with a suspension letter.
- [10] The contents of the letter are as follows:

“It has come to the attention of this office that, on Tuesday 9 June 2009 you conducted yourself in a despicable contemptuous and intimidating manner towards the Area Coordinator Development and Care, Ms Tjiane, while she was carrying out her line function duties in her office i.e engaged in a disciplinary process with one of her subordinates Ms Mbebe, you disrupted her administrative functions in her office despite the conditions set out in the court order.

Because of the seriousness of these allegations which warrants an urgent attention, you are therefore suspended from active duties with immediate effect and subjected to the following conditions: this suspension will be pending the finalisation of the investigation that will be conducted in this regard.

- *You must report personally once a week on Wednesday at or before 10:00 at AC Corporate Services (Mr Nel)*
- *You are not allowed to visit any Centre or any office of the institution without prior approval of the Area Coordinator Corporate Services.*
- *Your normal danger allowance will be suspended during the whole period of suspension*
- *In case a need arises for you to leave your place of residence for longer than 12 hours, prior written permission must be obtained from the office of AC Corporate Services.*

Please be informed that you are also afforded an opportunity to submit response to the office as to why this suspension must not stand. Your response must be submitted within 24 hours of receipt of this suspension letter.

AREA COMMISSIONER

LUDADA

[11] According to the applicant, Mphuti was not afforded a hearing prior to the decision to suspend him was taken, respondent is victimising him for exercising his role as a Trade Union official and for relaying a message on union activities.

[12] Applicant stated further that there is no objectively justifiable reason to deny Mphuthi access to the workplace based on the integrity of the investigation to the alleged misconduct or some factor that would place the investigation or the interests of affected parties in jeopardy.

[13] Applicant was also deprived of an opportunity to make alternative arrangements for the continuation of its activities.

- [14] On 17 June 2009, Applicant lodged an urgent application with the court seeking that his suspension should be reviewed and set aside. Applicant also requested that the respondent should be ordered to allow Mphuthi to return to work.
- [15] The application was served on the State Attorney on 17 June 2009 at 08h30.
- [16] On 18 June 2009 both parties appeared before court and agreed that the respondent will file an answering affidavit by 16h00 on the same date and the case was stood down until 19 June 2009 at 10h00.
- [17] Respondent has failed to file the answering affidavit on the 18th June 2009 at 16h00 as agreed. On the 19th June respondent filed its answering affidavit with the court but did not serve same on applicant.
- [18] On the 19th June 2009 both parties appeared before court but the case was postponed to 22 June 2009. Respondent handed applicant's counsel with its answering affidavit which was incomplete. The application was heard on 22 June 2009 but however as at the date of hearing, respondent had not served its answering affidavit on applicant save for the incomplete copy which respondent gave to applicant's counsel on 19 June 2009.

Point in limine

- [19] On 22 June 2009, applicant raised a point in limine and argued that respondent failed to comply with the agreement reached in court that it will file its answering affidavit on 18 June 2009 at 16h00. As at the time of hearing on 22 June 2009, respondent had not served its answering affidavit on the applicant's

attorney of record. Applicant argued further that the respondent's should have applied for condonation for the late filing of the answering affidavit.

[20] In response, respondent argued that it underestimated the time allocated for compiling the answering affidavit hence its failure to comply with the time frames. Respondent also stated that it attempted to serve the answering affidavit by midnight on the 18th June 2009 at the attorneys of record by pushing the document under the door of the chambers.

[21] Having considered the point in limine and the response thereto, I am satisfied that respondent did not serve the answering affidavit to the applicant's attorneys of record. Respondent did not provide any reasonable explanation for its failure to serve the answering affidavit. The rules of court allow for service even by fax and thus respondent's failure to serve even by fax cannot be accepted. There is further no valid explanation as to why respondent only served an incomplete answering affidavit on applicant's counsel on 19 June 2009. Furthermore since 19 June 2009, respondent still had ample opportunity to can serve the answering affidavit on applicant's attorneys of record but did not do so even as at the date of hearing on 22 June 2009. In the circumstances, respondent's conduct is unacceptable and the answering affidavit cannot be accepted.

[22] I will proceed and deal with the matter on an unopposed basis.

Analysis

[23] As stated above, applicant filed this application as an urgent application. This court should therefore first determine whether the application is urgent or not.

Urgency

[24] Rule 8(2) of the Rules of the Labour Court provides that: “*The affidavit in support of the application must also contain-*

(a) *The reasons for urgency and why urgent relief is necessary;*

(b) *The reasons why the requirements of the rules were not complied with, if that is the case; and*

(c)

[25] In *Chemical Workers Industrial Union & others v Sasol Fibres (Pty) Ltd* (a Division of the Sasol Group (1999) 20 ILJ 1222 (LC) at page 1226-1227 para 14-15 – the court held as follows: “(14) *It remains for me to consider whether the requirements for an urgent interim interdict have been met ...*(15) *In view of the fact that the changes sought to be interdicted presently are similar to those introduced in June 1998 it therefore begs the question: why were the June 1998 changes not interdicted? One assumes that if the present changes were result in irreparable harm the June 1998 changes must have had the same effect. That being the case it must therefore mean that the matter was not sufficiently desperate then to obtain an interdict. It therefore means that there is no sufficient urgency to warrant an interdict now. If indeed the matter is as pressing as is sought to be made in the papers this application should have been made in June 1998.* (own underling)

[26] The need for an applicant for urgent relief to act without delay was also emphasised in *University of Western Cape Academic staff Union & others v University of the Western Cape* (1999) 20 ILJ 1300 (LC). On page 1303 -1304

para. 15, the court held that: “...*Without attempting to be prescriptive I consider certain factors which, in my view, should determine the fate of applications for urgent interim relief in dismissal cases. Urgency will play a crucial role in the fate of such applications. Because labour relations is a dynamic and sometimes volatile field urgency remains a critical aspect. In my view an applicant who launches an application just before or at the time of the dismissal (or notice thereof) is given a better chance of establishing sufficient urgency to persuade the court to come to his aid*”.

[27] Applicant was suspended on 11 June 2009. He approached the court on an urgent basis on 17 June 2009.

[28] In the founding affidavit, applicant submitted that the application is urgent on the following grounds:

22.1 The suspension has a detrimental impact on Mphuthi and prejudices his integrity and reputation as a union representative as well as his job security.

22.2 The suspension has a detrimental impact on the union and prejudices its functioning in the Department within the framework of applicable labour legislation.

22.3 The suspension has a detrimental impact on the relationship between the union and the Department and prejudices the possibility of continued sound labour relations between the parties.

22.4 It is in the interest of justice that the unfair suspension of shopstewards should be brought to the attention of the court.

[29] The question to be asked is why did applicant only approach the court on 17 June 2009 and not immediately after the suspension.

[30] In my view, the reasons for urgency which applicant has provided to this court have been in existence from the date of suspension being the 11th June 2009. It follows therefore that if the reasons advanced justified urgency in this matter, applicant would have brought this application immediately after the suspension rather than to wait for seventeen days to pass. Applicant has furthermore not provided any explanation as to why this application was not brought immediately after the suspension. In line with the decision in *Chemical Workers Industrial Union v Sasol Fibres (Pty) Ltd* (supra), the failure by applicant to bring the application at the time the suspension was implemented in the circumstances of this case show that the matter is not urgent. This approach is in line with the principle laid down in *University of Western Cape Staff Union* case (supra).

[31] Since the 11th June to 17 June 2009, there have been no new facts which developed which are different from the facts which existed as at the 11th of June 2009. It therefore follows that since applicant did not regard the matter as urgent on the 11th of June 2009, he cannot regard the matter as urgent at this stage as the facts on which he relies on for urgency have been the same throughout. I therefore conclude that applicant has failed to show that this matter is urgent.

[32] Applicant referred to the case of Mokgotlhe v Premier North West Province (2009) 30 ILJ 605 (LC) and South African Post Office v Van Vuuren NO & others (2008) 8 BLLR 798 (LC) in support of his application. In my view the two cases are distinguishable from the present case on the following basis:

29.1 In Mokgotlhe's case the applicant had been suspended for an indefinite period which is not the case in the present matter. Furthermore, in Mokgotlhe's case the applicant did not only rely on the fact that a suspension interferes with his right to human dignity, self esteem etc but he was able to also prove that the suspension would cause him financial loss as it would deprive him of an opportunity to meet performance targets which were a condition for him to earn a performance bonus. These facts are not applicable in the present matter. I therefore conclude that applicant's reliance on the Mokgotlhe's case is in the context of this matter inappropriate.

29. 2 The decision in SAPO is distinguishable from the present case since the case was an ordinary review of an arbitration award and not an urgent application. The issue of urgency has not been dealt with in the SAPO case and thus reliance on that decision is also inappropriate in the context of this case.

[33] Apart from not having proved urgency, applicant has also not dealt with the issue of whether Mr Mphuthi has an alternative remedy or not. This is a further ground for denying applicant the relief sought. In view of my finding on urgency and the alternative remedy, it would serve no purpose to deal with all other requirements which an urgent application must comply with.

Order

[34] In the light of the above analysis, I make the following order:

- (i) The application is dismissed for lack of urgency.
- (ii) There is no order as to costs.

Nyathela AJ

Date of Hearing : 22 June 2009

Date of Judgment : 30 June 2009

Appearances

For the Applicant : Adv. J.L Basson

Instructed by: Grosskopf Attorneys

For the Respondent: Adv. L. Moloisane

Instructed by: State Attorney